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Attorneys for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

**USA COMMERCIAL MORTGAGE
 COMPANY'S OBJECTION TO
 PROOF OF CLAIM NO. 784 FILED
 BY BINFORD MEDICAL
 DEVELOPERS LLC**

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC

**Date: January 17, 2007
 Time: 9:30 a.m.**

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1 USA Commercial Mortgage Company (“USACM”), by and through its counsel, hereby
 2 files its objection (“Objection”) to Claim No. 784 (“Claim”) filed by Binford Medical Developers
 3 LLC (“Binford”) and moves this Court, pursuant to section 502 of title 11 of the United States
 4 Code (the “Bankruptcy Code”), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the
 5 “Bankruptcy Rules”), and Rule 3007 of the Local Rules of Bankruptcy Practice (the “Local
 6 Rules”) for an order granting the relief sought by this Objection. In support of its Objection,
 7 USACM states as follows:

8 **I. JURISDICTION**

9 1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
 10 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding
 11 under 28 U.S.C. § 157(b)(2)(B).

12 2. The statutory predicate for the relief requested herein is 11 U.S.C. § 502 and
 13 Bankruptcy Rule 3007.

14 **II. BACKGROUND**

15 3. On April 13, 2006 (“Petition Date”), USACM, USA Capital Realty Advisors, LLC
 16 (“USA Realty”), USA Capital Diversified Trust Deed Fund, LLC (“DTDF”), USA Capital First
 17 Trust Deed Fund, LLC (“FTDF” and together with DTDF, the “Funds”), and USA Securities,
 18 LLC (“USA Securities”) (collectively the “Debtors”) filed voluntary petitions for relief under
 19 chapter 11 of the Bankruptcy Code. USACM and the other Debtors continue to operate their
 20 businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the
 21 Bankruptcy Code. Management duties of USACM are conducted by Thomas J. Allison of
 22 Mesirow Financial Interim Management, LLC (“Mesirow”) who serves as the President and Chief
 23 Restructuring Officer.

24 4. On May 10, 2006, the Office of the United States Trustee filed notice indicating
 25 that the Official Committee of Unsecured Creditors of USA Commercial Mortgage Company and
 26 the Official Committee of Holders of Executory Contract Rights Through USA Commercial
 27 Mortgage Company (collectively the “Committees”) had been formed. No trustee or examiner has
 28 been appointed.

5. On September 14, 2006, the Court entered its Order Setting Deadline to File Proofs of Claim and Proofs of Interest (the “Bar Date Order”) (Docket No. 1280). The Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the deadline for creditors to file proofs of claim (“Bar Date”). The Court has extended the deadline for Direct Lenders to file proofs of claim to January 13, 2007.

6. On September 25, 2006, USACM served a copy of the Bar Date Order on its service lists (Docket No. 1358).

7. Binford filed its Claim on November 9, 2006, claiming an unsecured debt of \$3,502,383 for “Breach of Contract, Intentional Misrepresentation and other theories in attached Complaint.” The complaint attached to the Claim (“Complaint”) was filed in Adversary Proceeding No. 06-1212 commenced against USACM on November 7, 2006 (Docket No. 1752).

8. The Complaint is based on an agreement between Binford and USACM (the “Agreement”) whereby USACM arranged for a loan between Binford and a group of direct lenders (“Binford Direct Lenders”), which is evidenced by a Loan Agreement dated August 31, 2005, between Binford and the Binford Direct Lenders (“Loan Agreement”).

9. The Loan Agreement states that USACM and the Binford Direct Lenders have the exclusive right, but not the obligation, to increase the amount of the loan to Binford up to \$8,375,000. The Binford Direct Lenders funded the initial loan in the amount of \$4,250,000.

10. Binford also asserts that USACM is in breach of a separate agreement (the “Side Agreement”) dated August 30, 2005, whereby USACM agreed to cause the Loan Amount for the Binford Loan to be increased to \$8,375,000 from USACM’s own funds if necessary. Binford contends that the last \$925,000 of future advances were not made by USACM to Binford post-petition. Binford claims that it made demand upon USACM for the last \$925,000 of future advances.

11. USACM filed its answer (“Answer”) to the Complaint on November 30, 2006, denying any liability, asserting various affirmative defenses, and requesting the dismissal of the Complaint. USACM also filed a counterclaim against Binford the same day.

12. The last sentence of Paragraph 1 of the Side Agreement provides that “Notwithstanding the foregoing, Borrower acknowledges that no such advances need to be made when an Event of Default [under the Loan Agreement] exists, unless such Event of Default was caused by a default by USA under this Agreement.”

13. Paragraph 3.3 of the Loan Agreement requires Binford to keep the interest on the Binford Loan current, even if the interest reserve under the Binford Loan is exhausted. Binford failed to keep the interest on the Binford Loan current, and therefore was in breach of the Loan Agreement, causing an Event of Default. The Binford Direct Lenders funded the full \$500,000 of Interest Reserve required under the Loan Agreement, which was all used to pay interest on the Binford Loan. When the Interest Reserve was exhausted, Binford failed to keep the interest on the Binford Loan current.

14. USACM contends that Binford was in breach of the Loan Agreement before any obligation was allegedly breached on the part of USACM under the Side Agreement to make the last \$925,000 of future advances under the Loan Agreement. Therefore, USACM had no obligation to fund the last \$925,000 of future advances because of the existing Event of Default by Binford.

15. In addition, the damages claimed by Binford for the alleged breach of contract by USACM are not liquidated and are speculative, and should not be the basis for allowing a claim at this stage of these proceedings.

III. APPLICABLE AUTHORITY

16. Pursuant to section 502(a) of the Bankruptcy Code, any claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the court, after notice and hearing, shall determine the amount of the claim and shall allow the claim except to the extent that the claim is “unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b).

17. USACM is entitled to object to proofs of claim under section 502(a) of the Bankruptcy Code.

1 18. A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f).
 2 However, once an objection to the proof of claim controverts the presumption, the creditor
 3 ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford*
 4 *v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P.
 5 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate burden of proof as to the validity
 6 of a proof of claim “remains at all times upon the claimant.” *Lundell v. Anchor Constr.*
 7 *Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir. 2000).

8 **IV. OBJECTION TO BINFORD’S CLAIM**

9 19. USACM has analyzed Binford’s Claim and contends that it has no liability on
 10 account of the Claim. Pursuant to the Loan Agreement, neither USACM nor the Binford Direct
 11 Lenders were obligated to advance the full \$8,375,000 to Binford. Additional advances beyond
 12 the initial \$4,250,000 were to be made in the sole discretion of USACM and the Binford Direct
 13 Lenders. Even under the Side Agreement, there was an Event of Default by Binford for its failure
 14 to keep the interest on the Binford Loan current, which relieved USACM of any alleged obligation
 15 to fund the final \$925,000 of future advances on the Binford Loan. Moreover, Binford’s claimed
 16 damages are not liquidated and are speculative, and cannot be the basis for allowing a claim for
 17 voting purposes. Binford Binford’s Claim, therefore, is not enforceable against USACM and
 18 should be disallowed in its entirety pursuant to section 502 of the Bankruptcy Code.

19 20. USACM reserves the right to further object to any and all claims, whether or not
 20 the subject of this Objection, for allowance, voting, and/or distribution purposes, and any other
 21 grounds. USACM further reserves the right to modify, supplement and/or amend this Objection
 22 as it pertains to any claim or claimant herein.

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V. CONCLUSION

For the reasons set forth herein, USACM respectfully requests that the Court enter an order sustaining its Objection and disallowing Claim No. 784 filed by Binford in its entirety because it is not enforceable against USACM. USACM also requests that the Court grant such other and further relief as it deems just and proper.

Respectfully submitted this 11th day of December, 2006.

/s/ Lenard E. Schwartz, Esq.

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